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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 73

MARIANNA VON MOLTKE,
Petitioner,

vs.

A. BLAKE GILLIES,
Superintendent of the Detroit House of Correction,
Respondent

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITIONER'S BRIEF

G. LESLIE FIELD,
Attorney for Petitioner,
415 Dime Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

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OPINIONS BELOW

The opinion of the District Court (R. 170-174) is not reported. The majority and dissenting opinions in the Circuit Court of Appeals (R. 182-198) are reported in 161 F. 2d. 113.

JURISDICTION

Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended, being 28 U. S. C. 347.

QUESTIONS PRESENTED

Did petitioner freely, competently and understandingly waive her constitutional right to have the assistance of counsel in her defense as guaranteed by the VIth Amendment?

Was petitioner coerced, intimated and deceived by agents of the Federal Bureau of Investigation into pleading guilty to a charge of conspiracy to violate the Espionage Act and waiving her Constitutional right to have the assistance of counsel in her defense and thus deprived of her liberty without due process of law contrary to the provisions of the Vth Amendment?

STATEMENT OF CASE

Petitioner, a middle-aged woman, came to this country with her husband from Germany in 1927 (R. 70). They came to Detroit, Michigan in 1930 (R. 48). The husband became a naturalized citizen and was an instructor of German in Wayne University (R. 48). Petitioner is the mother of three American-born sons (R. 59). The youngest is a diabetic who, at the time of petitioner's arrest, required a supervised diet and two insulin injections daily (R. 48). Petitioner maintained a home for her family and looked after the youngest child constantly (R. 48).

Petitioner knew no English when she came to the United States and testified that she spoke German at home (R.

70). Petitioner's opportunities to learn English were limited as taking care of her home and her sick child took practically all her time (R. 89). She testified that she gained most of her knowledge of English from reading, and listening to the radio (R. 70), that she had a misleading vocabulary, and that she thinks in German and translates into English (R. 71). However, during her 31 months incarceration between her arrest and the hearing on her petition for writ of habeas corpus in the district court, she was able to improve her knowledge of English considerably (R. 71).

Because of her home duties and the diabetic child, petitioner was not active socially, but prior to her arrest she was able to do some volunteer war work and social service which included helping the families of mentally deranged persons at Ypsilanti State Hospital near Detroit (R. 89, 90). She belonged to no social clubs or political organizations (R. 90).

Prior to her arrest, petitioner had had no experience with courts and never had been involved in a court proceeding in any manner (R. 48). She was a housewife and mother (R. 88).

Between 6 and 7 o'clock on the morning of August 24, 1943, six F. B. I. agents came to petitioner's home and arrested her on a presidential warrant as a dangerous enemy alien (R. 48, 49). She was first taken to the Federal Building in Detroit where she was finger-printed, photographed and examined by a doctor after which she was questioned for four days by F. B. I. agents Collard and Hanaway (R. 49, 126, 127). Between questionings she was kept in close confinement at the immigration detention home. The F. B. I. agents were courteous, made no threats, and appeared to be friendly to her. During this period petitioner was not permitted to see her husband but F.

B. I. agent Collard called him on the telephone and obtained information about petitioner's diabetic son which he related to petitioner. She did not know why she was being detained except that she was being held for investigation under a presidential warrant as a dangerous enemy alien (R. 50). She was told by F. B. I. agent Hove that as an enemy alien she was not allowed to have an attorney (R. 50) and one of the officials at the immigration detention home advised her that a notice from the Enemy Alien Hearing Board permitted friends, relatives or counsel to listen in at the hearing but did not allow petitioner to be represented by an attorney (R. 50). On August 28, petitioner's close confinement was discontinued and on September 1, at 10 P. M. she had a hearing before the Enemy Alien Board (R. 49, 88).

About three weeks after her arrest petitioner was handed a lengthy indictment enumerating 47 overt acts charging her with conspiracy to violate the Espionage Act (R. 20-34). She testified that she read the indictment but did not understand it, that no one explained it to her (R. 50), and that she did not know the meaning of the word "conspiracy" or what she called the "over" acts (R. 50, 69, 85, 86, 87).

Three days after receiving the indictment, petitioner and another woman co-defendant were taken to a courtroom in the Federal Building where a criminal trial was in progress (R. 51, 52). The District Judge interrupted the trial and requested the attorney for the defendant in the criminal case being tried before him to represent petitioner and the other woman co-defendant (R. 11, 51, 110, 111). The attorney was reluctant to act but upon being assured by the District Judge that it would be *only for the arraignment and would take only a few minutes*, consented (R. 51, 111). While both women were seated in the courtroom, the reluctant attorney held a hurried

whispered conversation with them. He did not see the indictment, discuss the charges or advise them in any way except to urge them to stand mute, which they did, though petitioner testified that she did not understand the procedure (R. 52, 112). This was the only contract the attorney had with petitioner and the other woman co-defendant. The whole proceeding took only a few minutes (R. 112). Later the same day the attorney entered a written appearance for both women defendants "for arraignment only" (R. 47, 112, 113). Immediately following the arraignment, the District Judge told petitioner he would appoint another attorney to represent her at the trial (R. 53). No attorney was appointed, however, and petitioner waited in vain for one to come and assist her (R. 57). Neither petitioner nor her husband had any means to retain or pay counsel (R. 51, 167, 168).

On September 25, 1943, two attorneys, Okrent and Berger, visited petitioner at the county jail at the request of her husband. Okrent was a former student of petitioner's husband at Wayne University (R. 93, 114). Berger was the senior member of a law firm with which Okrent was associated. Both had been told by petitioner's husband, who had lost his instructor's position shortly following petitioner's arrest and had taken a job at $35 per week (R. 150, 168), that neither he nor petitioner had any funds or property with which to retain or pay counsel (R. 13). The visit was made primarily to determine facts and to report to petitioner's husband (R. 116). Berger advised petitioner that he and Okrent were not appearing at the jail as her attorneys and that *if she should disclose any information that he thought the Government should know about, he would feel free to report it* (R. 116). Neither of the attorneys advised petitioner regarding her rights or discussed possible defenses to the charges against her (R. 13, 14, 117) and Berger expressly told her they were not

there to advise her (R. 120). The fact that Berger and Okrent were Jews was considered and discussed as a complicating factor (R. 116). Berger and Okrent reported their interview to petitioner's husband and declined to take the case (R. 14, 119).

Petitioner appealed to F. B. I. agents who visited and talked with her at the county jail for advice as to what she should do (R. 96, 121, 122). She testified on cross-examination that there was no one else she could ask (R. 96). Two of the agents told her they could not advise her (R. 129, 147). One of them, Dunham, testified (R. 151):

> "Mrs. von Moltke was endeavoring to get advice or information from me, or opinions, and yet she realized I couldn't give her opinions, but she tried in the best way she could to get some idea."

Agent Collard, however, undertook to advise her. He had practiced law in Texas before joining the F. B. I. (R. 140) and told petitioner he was a lawyer (R. 56). Collard spent several hours with petitioner in the matron's office at the county jail "explaining" the indictment to her and attempting to define the nature of a conspiracy (R. 55, 141, 142). In doing so he used an example called the "Rum Runners" which she understood as follows (R. 55):

> "* * * if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still after two years this plan is carried out, in the law the man who was present * * * nevertheless is guilty of conspiracy." [1]

[1] Although Collard said he could not remember using the "Rum Runner" example (R. 142), he testified (R. 143): "* * * it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration." Agent Hanaway who worked with Collard on the case and was present at the time the latter explained the indictment to petitioner remembered that he used an illustration but could not recall whether it was the one involving rum runners (R. 129).

Thus advised, petitioner concluded that the mere act of conferring with people who later turned out to be guilty of criminal acts, would make her guilty as a conspirator.[2] She said to agent Collard (R. 55):

> "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?"

Collard told her that the probation department would collect the proper data and present it to the judge so that he would "know what to go by" (R. 55), and that she could make a statement to the court at the time sentence was imposed (R. 145).

Sometime between September 23 and October 7, 1943, F. B. I. agent Kirby told another woman defendant in petitioner's presence that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case would plead guilty the following week (R. 84). Petitioner asked Kirby whether she would be allowed to have a trial if all the other defendants pleaded guilty and testified that Kirby said he could not answer the question because "he did not know if this would be all right with the prosecuting attorney" (R. 85).[3]

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[2] Collard admitted that it was quite possible petitioner asked him at the time of his conference with her concerning the indictment whether "merely conferring with people who later turned out to be guilty of criminal acts would also make her a criminal" but could not recall the particular question (R. 144).

[3] Kirby stated that he did not recall making the statement that other defendants were pleading guilty but admitted that petitioner asked him whether she would have the right to a trial if all other defendants pleaded guilty and that to the best of his recollection his answer was that the question of trial would be up to the United States Attorney's office (R. 134).

Believing her case hopeless and that she had no alternative but to plead guilty (R. 58, 78), petitioner made inquiry as to the consequences of such a plea with respect to publicity, place of imprisonment and deportation (R. 58, 59, 101). Assistant United States Attorney Babcock advised her that he had no control over the newspapers or deportation, but that because of her sick child, he would write a letter to the bureau of prisons recommending imprisonment near Detroit (R. 123, 159). He emphasized the fact that his recommendation would not be binding on the bureau and made it clear to petitioner that if she pleaded guilty it would have to be without conditions (R. 125, 164). Petitioner made no request for leniency or other concessions in connection with her inquiry into the probable consequences of a plea of guilty (R. 125, 129, 133, 138, 163). At this time, petitioner spoke to her husband. He advised her not to do anything until she had seen a lawyer (R. 60). Petitioner then told Assistant United States Attorney Babcock or F. B. I. agent Hanaway that she was not ready to plead guilty. This occurred on September 28, 1943 (R. 60).

Shortly afterwards, petitioner was told by a woman co-defendant who was her cellmate, that unless petitioner pleaded guilty, her husband would be implicated (R. 54, 61). Greatly disturbed and troubled by this news, petitioner, in desperation asked to see F. B. I. agent Collard (R. 54, 64). When he arrived at the jail petitioner repeated to him what she had heard and asked him if it was true. Collard told her he could not answer her question (R. 61) which she interpreted as an indication that there was some truth in the report and decided it would be best to plead guilty (R. 62). Up to this time the attorney the district judge before whom she had been arraigned had promised to appoint for her had not appeared (R. 62) though she had waited for him to come (R. 57).

On October 7, 1943, petitioner told F. B. I. agents Hanaway and Collard that she would plead guilty (R. 63). She was taken by them to the Federal Building, where, accompanied by Assistant United States Attorney Babcock and F. B. I. agent Collard,[4] petitioner was taken before a District Judge and, without counsel, signed a partially illegible mimeographed "waiver" (R. 36) which she testified she did not understand (R. 66, 67) but signed because she was told it was "all right" and just a matter of form (R. 67, 109), and pleaded guilty to the charge in the indictment (R. 35).

Before receiving the plea, the District Judge stated to Assistant United States Attorney Babcock that he did not believe he could accept the plea as there was an appearance of an attorney (R. 47) in the file (R. 66, 107, 130). There followed a 5 minute discussion between the District Judge and Babcock (R. 130) with the result that the plea was finally accepted (R. 66, 130, 168).

Prior to accepting the plea, the District Judge asked petitioner if she was pleading guilty because she was guilty and she replied in the affirmative (R. 133, 139); if any threats or promises had been made to her, and she said no; whether she understood the nature of the charges in the indictment and she said she did (R. 139, 160). Petitioner testified that she answered yes when asked whether she understood the charge in the indictment because the indictment had been explained to her by F. B. I. agent Collard (R. 107). Although Assistant United States Attorney Babcock testified that he thought there was a court reporter present in the courtroom at this time, the Government produced no transcript of the proceedings

[4] F. B. I. agents Hanaway (R. 130), Kirby (R. 132), and Dunham (R. 154) were also present in the courtroom at this time.

(R. 161). Babcock himself had no independent recollection as to the questions asked petitioner by the District Judge, but testified from what he described as the "normal procedure" (R. 160). There is no proof or claim that the District Judge explained the consequences of a plea of guilty to petitioner. The maximum sentence petitioner was subject to was death.[5]

Petitioner testified that she could not remember who handled her the "waiver" or what was said about it (R. 67). She tried to read it and said she thought it meant she was to appear for trial whenever she was wanted and testified that she told Assistant United States Attorney Babcock that she would not sign the paper as she did not want a trial, but that she signed it when he assured her it was all right to do so, and just a matter of form (R. 109, 110). The paper in question, a mimeographed form, is entitled almost illegibly "Waiver of Assignment of Counsel" and purports to waive petitioner's right "to be represented by counsel *at the trial of this cause*" (R. 36; emphasis added).

Petitioner did not talk with her husband again before pleading guilty (R. 104). She felt that she had made a mistake but believed it was not possible to correct it. Shortly after Christmas, 1943, she learned that she could withdraw her plea of guilty and have a trial and also that in the United States under the Constitution, a defendant charged with crime does not have to prove his innocence as is the case in European countries but that it is the duty of the prosecuting attorney to establish guilt (R. 73). She testified that F. B. I. agents Dunham and Collard confirmed the truth of what she had learned (R. 78, 79). F. B. I. agent Kirby testified that sometime

[5] 50 U. S. C. A. 32, 34.

after the first of 1944 he heard petitioner say that she had made a mistake in pleading guilty (R. 133) and agent Collard testified that petitioner discussed with him her desire to change her plea and that he advised her it was her privilege to do so (R. 145). Prior to pleading guilty, petitioner understood from agent Collard's explanation of the indictment and the "rum runner" illustration that it would be up to her to prove her innocence of the charge against her (R. 55, 73, 75, 78).

After considerable delay (R. 43, 45) petitioner was successful in being taken before the District Judge who had presided at her arraignment and she made known to him her desire to withdraw her plea of guilty. He advised her that a motion to that effect should be made by an attorney and appointed Attorney Okrent to represent her for the purpose of making the motion (R. 45).* The motion was finally brought on for hearing on November 15, 1944 (almost a year and three months after petitioner's arrest). Without taking any testimony or permitting petitioner to take the stand, the motion for leave to withdraw the plea of guilty was denied and petitioner was immediately sentenced to four years' imprisonment (R. 8, 46, 47). Thereafter petitioner's writ of habeas corpus was dismissed after hearing in the District Court (R. 175). The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Sixth Circuit, one Judge dissenting (R. 181-198).

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* The 10 days allowed by Rule 2 (4), Rules of Procedure for Pleas of Guilty, 18 U. S. C. A. following 688, then in effect, within which to withdraw a plea of guilty had long expired. *Cf. Canizio v. New York*, 327 U. S. 82; *United States v. Smith*, — U. S. —; 67 S. Ct. 1330.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals under the undisputed evidence and proofs herein erred in holding that petitioner freely, competently and understandingly waived her Constitutional right to the assistance of counsel in her defense as guaranteed by the VIth Amendment, and in affirming the decision of the District Court on that issue.

2. The Circuit Court of Appeals erred in holding under the undisputed evidence and proofs herein that petitioner was not coerced, intimidated and deceived by agents of the F. B. I. into pleading guilty without the benefit of counsel and thus deprived of her liberty without due process of law contrary to the mandate of the Vth Amendment, and in affirming the decision of the District Court on that question.

SUMMARY OF ARGUMENT

PETITIONER DID NOT FREELY, COMPETENTLY AND UNDERSTANDINGLY WAIVE HER CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL IN HER DEFENSE AND PLEAD GUILTY TO THE CHARGE IN THE INDICTMENT FOR THE FOLLOWING REASONS:

(a) Petitioner's background and experience disqualified her from comprehending the lengthy and complex indictment charging her with conspiracy without the assistance of counsel.

(b) Petitioner was confused and misled as to her right to be represented by counsel in that

(1) She was given conflicting and confusing advice as to whether she was entitled to counsel.

(2) Petitioner was confused and misled by the wholly inadequate and ineffective "assistance" of counsel furnished her at the arraignment.

(3) Petitioner was confused and misled by the nonappearance of counsel the court promised to appoint for her following the arraignment.

(c) Petitioner was given erroneous and misleading advice by an agent of the F. B. I. who undertook to explain the indictment and the nature of a conspiracy to her from which she understood that if she went to trial she would have to prove her innocence of the charge and that the case was hopeless.

(d) Petitioner's plea of guilty was coerced by agents of the F. B. I.

(1) F. B. I. agent Collard gave petitioner erroneous and misleading advice as to the indictment, the nature of the charge and her legal rights.

(2) F. B. I. agent Collard permitted petitioner to believe there was truth in a report that unless she pleaded guilty her husband would be implicated.

(3) F. B. I. agent Kirby gave petitioner to understand that if she were the only defendant not pleading guilty, the question of whether she would be permitted to have a trial would be decided by the United States Attorney's office.

(e) The purported waiver of counsel signed by petitioner is invalid because

(1) The waiver itself is illegible in essential parts including the identifying title, and by its terms

is a waiver of the right to be represented *at the trial of the cause;*

(2) Petitioner did not understand and was not advised of the meaning and consequences of the waiver and signed it upon the assurance of the United States attorney in charge of the case that it was just a matter of form;

(3) The coercion to which petitioner was subjected vitiated the purported waiver of counsel.

(f) Petitioner was not apprised of the consequences of waiving counsel and pleading guilty to a charge carrying a maximum penalty of death.

ARGUMENT

PETITIONER DID NOT FREELY, COMPETENTLY AND UNDERSTANDINGLY WAIVE HER CONSTITUTIONAL RIGHT TO HAVE THE ASSISTANCE OF COUNSEL IN HER DEFENSE AND PLEAD GUILTY TO THE CHARGE IN THE INDICTMENT FOR THE FOLLOWING REASONS:

(a) Petitioner's background and experience disqualified her from comprehending the lengthy and complex indictment charging her with conspiracy without the assistance of counsel.

The Sixth Amendment to the Constitution provides in part

> "In all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defence."

The proofs show that neither petitioner nor her husband had any funds or property with which to retain or pay an attorney. Petitioner therefore was entitled to the protection afforded by the Sixth Amendment unless she competently waived it.

It is conceded here as it was in both the District Court and the Circuit Court of Appeals that an accused may waive his right to counsel, *Adams v. United States ex rel. McCann*, 317 U. S. 269, provided it is done freely and understandingly, *Johnson v. Zerbst*, 304 U. S. 458; *Walker v. Johnston*, 312 U. S. 275.

Tests to determine the validity of such waivers have been announced by this Court and the question is ordinarily one of fact as pointed out in *Johnson v. Zerbst*, *supra*, as follows:

"The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, *including the background, experience, and conduct of the accused.*" (Italics added.)

Petitioner's Background and Experience

Petitioner knew no English when she arrived in this country with her husband in 1927. Because of her household duties and the attention required by her diabetic son, her opportunities to learn English were limited. She spoke only German at home and learned some English through reading and listening to the radio.[1] Her only activities outside the home were voluntary work done for the American Red Cross, social work at the Y. W. C. A., helping with gasoline rationing, attending P. T. A. meetings and assisting with mentally deranged people at a nearby state hospital. Because of her housework and sick child, however, she was not able to devote much time to these activities. She belonged to no social or political organizations. Shortly after petitioner's arrest, her husband lost his position as instructor at Wayne University and took another job at $35.00 a week. Prior to her arrest in this case, petitioner had had no contact of any kind with courts and had no knowledge of legal procedure.

Nature of Charge

The indictment to which petitioner pleaded guilty is a lengthy one (R. 20-34) naming eight defendants and six-

[1] Beginning with her arrest petition was in custody about 31 months. During that time she was required to speak English and testified that between the time of her arrest and the hearing on her petition for writ of habeas corpus she was able to improve her knowledge of English considerably (R. 71).

teen co-conspirators. Forty-seven overt acts are set forth of which five (R. 29, 31; XXIV, XXIX, XXX, XXXI, XXXII) name petitioner. The indictment charges the defendants with conspiring to violate the Espionage Act of 1917, 50 U. S. C. A. 32 (unlawfully disclosing information affecting national defense).

That the complication of the charge is an important factor in determining whether an accused was wrongfully denied assistance of counsel has been pointed out by this Court in a number of cases. *Tomkins v. Missouri*, 323 U. S. 485; *Rice v. Olson*, 324 U. S. 786; *Hawk v. Olson*, 326 U. S. 271.

Very early during the hearing on the writ of habeas corpus in this case, the District Judge concluded that petitioner was a very intelligent woman (R. 49 and see R. 69, 129) and the majority opinion of the Circuit Court of Appeals states that the record shows her to be extremely intelligent with a remarkable command of the English language for a foreign-born person (R. 183).

Neither petitioner's background and experience nor the record seem to support these conclusions. A mere scanning of her testimony demonstrates, it is believed, that petitioner, even after 31 months of improving her English, had difficulty in making herself understood (e. g. R. 50, 54, 65, 66, 67, 69, 70, 71, 76, 80, 81, 82). It is undisputed that petitioner's experience did not encompass legal proceedings. If intelligence is to be measured by one's ability to put acquired knowledge to use for survival, petitioner failed to pass the test as she exhibited an almost total inability to comprehend and react to forces and events following her arrest. Her self-conviction and imprisonment were the almost inevitable result of fortuitous circumstances over which she had no control (e.g. the non-appearance of counsel promised by the court) and her own

confusion, bewilderment and feelings of helplessness. Petitioner's background and experience did not qualify her to cope with the overwhelming problems that confronted her beginning with her arrest when she was abruptly removed from the quiet routine of her home and plunged into a strange and terrifying world of new relationships where a different and unfamiliar language was spoken and subjected to such experiences as prolonged interrogations by trained criminal investigators, a night hearing before an Enemy Alien Hearing Board, being handed a 17-page indictment couched in legal terms, a court arraignment during which an attorney she had never seen before held a short whispered conversation with her and advised her to "stand mute," the long, futile wait for the attorney the judge promised to send to help her, the appalling "legal" advice given her by an agent of the F. B. I. which convinced her she was doomed and that there was no alternative but to plead guilty, the paralyzing fear that unless she pleaded guilty her husband would be implicated and her children would suffer and the final nightmare of pleading guilty followed, as an anticlimax, by prolonged and unsuccessful efforts to withdraw the plea.

Petitioner was charged with conspiracy to violate the Espionage Act of 1917. A conspiracy is not easy to define.

> "It has been said that there is perhaps no crime an exact definition of which is more difficult to give than the offense of conspiracy; a difficulty resulting in a large measure from the fact that the law on the subject of conspiracy, except where settled by legislative enactment, is, beyond certain limits, in a very uncertain state; the cases beyond such limits, which have been adjudged to be conspiracies, appear, it has been said, 'to stand apart by themselves' and to be 'devoid of that analogy to each other which would render them susceptible to classification.'" *12 C. J.* 540.

The truth is that lawyers and even judges often have great difficulty in determining what constitutes a conspiracy. *Gebardi v. United States*, 287 U. S. 112; *United States v. Falcone*, 311 U. S. 205; *Hartzel v. United States*, 322 U. S. 680.

This Court recognized the difficulties confronting a defendant charged with conspiracy in *Glasser v. United States*, 315 U. S. 60, where it was pointed out (p. 76):

> "In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of counsel without the court's becoming a party to encumbering that assistance."[2]

The seriousness and complication of the charge against an accused are important factors in determining the accused's right to and need for counsel. In *Tomkins v. Missouri*, 323 U. S. 485, the defendant, charged with first degree murder, was not provided with counsel. This Court said:

> "• • • the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple ones but ones over which skilled judges and practitioners have disagreements. The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense • • •."

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[2] The quoted language was used with reference to Glasser, a United States District Attorney with four years' experience in criminal cases and is applicable, *a fortiori*, to petitioner who was wholly inexperienced in legal matters. Cf. *Betts v. Brady*, 316 U. S. 455; *United States v. Hill*, 29 F. Supp. 890.

In *Rice v. Olson*, 324 U. S. 786, Rice, an Indian, without benefit of counsel, pleaded guilty to a charge of burglary. It subsequently appeared that the offense had been committed on a Government Indian Reservation. This Court stated:

> "The petitioner's need for legal counsel in this case is strikingly emphasized by the allegation in his habeas corpus petition that the offense for which the state court convicted him was committed on a government Indian Reservation 'without and beyond the jurisdiction of the Court.' This raises an involved question of federal jurisdiction, posing a problem that is obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill."

In his dissenting opinion in *Foster v. Illinois*, — U. S. —, 67 S. Ct. 1716, Mr. Justice Rutledge wrote:

> "Here petitioners were charged with the serious crimes of burglary and larceny * * * Every lawyer knows the difficulties of pleading to such charges, including the technicalities of the applicable statutes and especially of the practice relating to included or lesser offenses."

See also *Hawk v. Olson*, 326 U. S. 271.

The contention implicit in the opinion of the District Judge and in the majority opinion in the Circuit Court of Appeals that petitioner easily could have determined for herself whether or not she was guilty of the charge set forth in the voluminous indictment, is, it is submitted, unwarranted and insupportable. The assumption underlying this contention is that guilt or innocence can readily be determined by the simple process of "searching one's conscience." Assistant United States Attorney Babcock advised petitioner that she would have to decide for her-

self on the basis of her own conscience whether to plead guilty (R. 159) and F. B. I. agent Collard told her when she asked him whether she should plead guilty or not guilty that "it was a matter strictly for her, and for nobody else" (R. 137). Attorney Berger who visited petitioner at the jail but declined to represent her testified (R. 120): "And I again reiterated to her that I am not going to advise you whether you should plead guilty or whether you should not; if you are guilty, plead guilty; and if you are not, do not; and I cannot and Okrent cannot tell you yes or no on the thing * * *." When asked by the court whether he told petitioner to plead guilty if she were guilty and if she were not guilty, not to plead guilty, Berger testified (R. 120): "Something to that effect; that I am not here to advise you."

These repeated intimations that petitioner could and must determine her own guilt or innocence without the aid of counsel grossly oversimplified and misrepresented intricate problems of fact and law. If it were true that laymen easily can determine their own guilt or innocence without the help of counsel, the Constitutional guarantee of assistance of counsel would be unnecessary and the admonitions of this Court as to the ability of laymen to cope with the criminal proceedings would be superfluous. The cold truth of the matter is that determination of guilt or innocence is one of the knottiest and most difficult processes in the administration of justice. For a case in point see *United States v. Heine*, 151 F. 2d 813, C. C. A. 3. If petitioner were to be expected to fathom guilt or innocence by searching her conscience, she should have been provided with competent legal counsel to accompany and guide her on the search.

It is stated in the majority opinion of the Circuit Court of Appeals that petitioner's own testimony contradicts

her statement that she did not understand the charge (R. 184). On cross-examination petitioner admitted that she had read the indictment and that she felt she was innocent of the charges (R. 90, 91). From this it is contended that petitioner must have known what the charges were, but it is submitted that this conclusion is a *non sequitur*. The key word in the question put to petitioner on cross-examination was the word "innocence" and what petitioner obviously was attempting to do was to protest her innocence. She was easily tricked into overlooking that part of the question which implied understanding of the nature of the charges and eagerly answering the portion which gave her an opportunity to assert her innocence. Her subsequent answers show clearly that she was referring to the overt acts rather than the charge (R. 75, 76).

A good example of petitioner's confusion and inability to understand the nature of the charge was her repeated denial that she had ever been in Grosse Pointe (a suburb of Detroit) as stated in overt act XXXI (R. 31) and her statement that therefore she was not guilty (R. 63, 65, 68). Apparently puzzled, the District Judge questioned petitioner on the point as follows (R. 68, 69).

> "Q. (By Mr. Kronner): Did you know, Mrs. Von Moltke, what the charges against you were, from a reading of the indictment?
>
> A. You mean what the accusation was?
>
> Q. Yes.
>
> A. I knew I had never been in Grosse Pointe.
>
> Mr. Fordell: That is not responsive to the question.
>
> The Court: When you refer to that fact—you knew you were not in Grosse Pointe—why did you say that, why did you give that answer?
>
> The Witness: Because what I read in the accusations, I felt I was not guilty of it and I talked this

over with Mr. Collard,[3] because Mr. Collard took my statement, and he knew that I had told the truth and that I was not guilty of the 'over' acts."

For another example see R. 77-78.

In the light, therefore, of petitioner's background and experience and the complicated nature of the charge brought against her, it is idle to say that she was competent to comprehend the nature of the charge and to make an intelligent determination of her guilt or innocence without the assistance of counsel. *Glasser v. United States, supra; Johnson v. Zerbst, supra.*

(b) Petitioner was confused and misled as to her right to be represented by counsel in that

(1) She was given conflicting and confusing advice as to whether she was entitled to counsel.

When petitioner was first taken into custody she was told by F. B. I. agent Hove that as an enemy alien she was not entitled to counsel (R. 50) and later an immigration officer told her that she would not be allowed to have counsel before the Enemy Alien Hearing Board, though friends or relatives would be permitted to attend the hearing (R. 50). No one explained to petitioner when she was handed the indictment that thenceforth she was entitled to the assistance of counsel (R. 51). Assistant U. S. Attorney Babcock admitted that he did not point out to petitioner that there was a difference between the two proceedings (R. 164, 165) though he questioned her at the hearing before the Enemy Alien Hearing Board, conferred with her twice before she pleaded guilty (R. 58, 158) and appeared with her before the court when the plea was

[3] of the F. B. I.

entered (R. 65-67). Petitioner testified that she never knew there was any difference between the two proceedings (R. 167, 170).

It is true F. B. I. agent Collard testified that five days before she pleaded guilty, he told petitioner that "technically she had been re-arrested on that indictment" (R. 141), but he did not testify and there is no claim that he or anyone else explained to her that beginning with her "technical" re-arrest she was entitled to counsel. Obviously petitioner with no knowledge of legal procedure could not be expected to draw that conclusion. The record shows petitioner was informed by the court at the time of her arraignment that she was entitled to counsel (R. 51) but this was followed by a wholly inadequate and perfunctory example of legal representation on arraignment and the subsequent nonappearance of counsel the court promised to appoint to represent her at the trial.

It may be contended that petitioner should have accepted as conclusive the statement of the court as to her right to counsel. It should be noted, however, that petitioner received conflicting advice as to her right to have counsel from apparently authoritative sources, that she was ignorant of legal proceedings, and that she was incapable of resolving the conflict. It cannot be denied upon this record that so far as the Constitutional guarantee of assistance of counsel was concerned, the case against petitioner got off to a bad start.

(2) Petitioner was confused and misled by the wholly inadequate and ineffective "assistance" of counsel furnished her at the arraignment.

(3) Petitioner was confused and misled by the nonappearance of counsel the court promised to appoint for her following the arraignment.

The importance of counsel to an accused in a criminal prosecution was most forcefully stated in *Powell v. Alabama*, 287 U. S. 45 (p. 69) as follows:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise unadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Equally vital to an accused is assistance of counsel in connection with a plea of guilty, as was pointed out in *Williams v. Kaiser;* 323 U. S. 471, p. 475 (referring to the above-quoted language) as follows:

> "Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial. The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevo-

> cable and forecloses any possibility of establishing innocence * * * Only counsel could discern from the facts whether a plea of not guilty to the defense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment."

Compliance with the Constitutional guarantee of assistance of counsel must be more than formal; it must be substantial and effective. *Powell v. Alabama, supra; Hawk v. Olson, supra.*

In *Powell v. Alabama,* the trial court appointed all the members of the bar of the county to represent three defendants, charged with rape, at their arraignment and stated "then of course I anticipated them to continue to help them if no counsel appears." Counsel did represent the defendants at the trial but without preparation and ineffectively. The record shows the representation to have been *pro forma.* The defendants were convicted and sentenced to death. This Court designated the action of the trial judge in appointing the entire county bar to represent defendants as little more than an expansive gesture and said:

> "* * * during the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Similarly in *Hawk v. Olson, supra,* this Court said:

> "* * * the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment."

The facts as to the kind of representation of counsel petitioner was furnished at her arraignment are undisputed. An attorney then trying a criminal case was asked by the presiding judge to represent petitioner and a woman co-defendant on their arraignment. He objected but his objections were overcome by the judge who told him it would be only for the arraignment and would take only a few minutes. The attorney had never seen either petitioner or her co-defendant before. He went over to where they were seated in the courtroom and, bending over, held a whispered conversation with them. He did not see the indictment or advise them as to the charge. He asked them "both at once" whether they understood "what this is all about" and testified the "one or the other of them said, yes, they did understand and the other indicated that she, too, understood."[4] He then asked them if they felt they were guilty or not guilty, and both indicated they were not guilty. He testified: "I then rather hurriedly explained to them the advantage of standing mute as against pleading not guilty at that moment, and it was agreed that they would both be stood mute." He further testified (R. 112):

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[4] In connection with this testimony, the majority opinion in the Circuit Court of Appeals refers to the attorney who appeared for petitioner on arraignment as a "disinterested witness" (R. 183).

"Q. And then what happened?

A. Well, I took them both up before the Court; I believe that Judge Moinet was sitting there all the time; and we came up before the clerk's bench, and I indicated to the Court that both defendants were standing mute.

Q. Do you recall whether Judge Moinet said, while you were there, that he would appoint counsel for Mrs. von Moltke?

A. I am not too sure of that. I do know that it was definitely understood that I was to represent them on the arraignment only.

Q. How long did this conversation that you had with Mrs. von Moltke and Mrs. Leonhardt—how long a time did that occupy?

A. Just a matter of a couple of minutes.

Q. And as I understand it, it was a whispered conversation?

A. That is right.

Q. Entirely?

A. Yes.

Q. You did not have the indictment?

A. No, I did not.

Q. You did not advise them of the nature of the charges?

A. No, I did not.

Q. You did not advise them on anything excepting as to the advisability of standing mute?

A. That is correct.

Q. Was that the extent of the service, of the legal assistance that you gave Mrs. Leonhardt and Mrs. von Moltke?

A. Yes, I had no further contact with them.

Q. Did you enter your appearance formally for them?

A. Yes, later on that day."

The special appearance for arraignment only was duly filed in accordance with the order of the District Judge (R. 47).

It is not believed that the Government will contend that the representation afforded petitioner on her arraignment satisfied either the mandate of the Sixth Amendment or the rulings of this Court. It may be argued that, admitting the inadequacy of this perfunctory "assistance" of counsel, nevertheless petitioner finally waived her right to counsel and the error, if any, was cured. This argument, however, overlooks entirely the causal connection between the inadequate representation and the final plea of guilty. It is submitted that the example of legal assistance given petitioner at the arraignment cannot be isolated but must be considered in relationship to preceding and subsequent events—events that controlled and determined the final result.

Petitioner was entitled to exclusive, continuous and effective assistance of counsel. *Glasser v. United States, supra; Hawk v. Olson, supra.* The assistance of counsel provided for her at the arraignment was not exclusive as the attorney represented two defendants indiscriminately; it was obviously not continuous as it terminated as abruptly as it began; and it was unquestionably ineffective.

Petitioner needed and was entitled to counsel qualified, willing and able to spend the time necessary to advise her as to the nature of charge and her legal rights. Had such assistance been furnished at or prior to arraignment, it is reasonable to assume that the whole course of events would have been changed and petitioner's case heard, if at all, on the merits.

After the plea of not guilty was entered at the arraignment, petitioner testified that the following occurred (R. 53):

"Q. Now then, do you recall whether or not Judge Moinet made any further statement about an attorney?

A. Judge Moinet said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away."

Petitioner was arraigned on September 21, 1943. Four days later she was visited by attorneys Berger and Okrent. The latter inquired whether she was to have counsel and she told him the court was going to appoint one for her (R. 93). She testified (R. 57):

"Q. Up to that time had any other attorney advised you?

A. No, sir.

Q. Were you waiting for any attorney?

A. I was waiting for an attorney.

Q. What attorney?

A. Please?

Q. What attorney were you waiting for?

A. The attorney which Judge Moinet was going to appoint for me."

Agents of the F. B. I. who visited petitioner at the jail at this time asked her whether she had seen her attorney. She told them she had not and they made no comment (R. 65, 84). She testified "I just was wondering about the lawyer who never came" (R. 103).

Petitioner's testimony as to the court's promise to appoint another attorney for her following the arraignment and the fact that no attorney appeared to counsel or assist her stands undisputed. Judge Moinet before whom petitioner was arraigned did not testify.

It can hardly be argued that the nonappearance of the promised attorney could have been anything but confusing to petitioner. The admitted failure of counsel to appear

lends considerable weight to petitioner's testimony that "I even did not know whether I was really entitled to counsel". (R. 106). There can be no denial of the fact that petitioner was entitled to have the effective assistance of counsel at every step of the proceedings, particularly during the critical period between arraignment and trial. *Powell v. Alabama, supra; Hawk v. Olson, supra.*

(c) Petitioner was given erroneous and misleading advice by an agent of the F. B. I. who undertook to explain the indictment and the nature of a conspiracy to her from which she understood that if she went to trial she would have to prove her innocence of the charge and that the case was hopeless.

When the attorney promised by the court failed to put in his appearance, petitioner turned to agents of the F. B. I. who visited and discussed the case with her at the jail for advice and information. She testified on cross-examination (R. 96):

> "Q. Now, isn't it true that up until the time you pleaded guilty you repeatedly asked the agents for advice as to whether you should plead guilty or not? Isn't that true?
> A. There was nobody else I could ask.
> Q. Well, just say yes or no.
> A. Yes."

She asked agent Hanaway to explain the indictment to her but he refused (R. 121) telling her he was not a criminal attorney (R. 129). Agent Dunham also was asked by her to explain the indictment and the nature of the charges, but he likewise declined to do so (R. 147).

F. B. I. agent Collard, however, was more accommodating. He had practiced law in Texas before joining the

F. B. I. He was the agent who had arrested petitioner on the presidential warrant and with agent Hanaway had interrogated her for four days following her arrest. Petitioner knew that he was an attorney because he told her so (R. 56). At petitioner's request, Collard spent several hours with her in the matron's office at the jail explaining the indictment and the nature of a conspiracy (R. 141, 142). Petitioner testified that Collard explained the indictment to her by an example which he called the "rum runners" and said (R. 55): "This is what I understood: That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and * * * doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years plan is carried out, in the law the man who was present becomes * * * guilty of conspiracy." Petitioner concluded from this that the mere act of conferring with people who later turned out to be guilty of criminal acts would also make her guilty and she said to Collard (R. 55):

> "If that is the law in the United States, I don't know how I ever can prove myself innocent, and how will any judge know how am I guilty if this is the law?"

Collard then told her that the probation department (of which she had not heard before) would collect the proper data and present it to the judge so that he would "know what to go by."[5]

As a result of her interview with Collard, petitioner concluded that she had the burden of proving herself

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[5] Agent Dunham testified that petitioner asked him about the probation department and that he explained to her that the officers conducted an investigation into her life and made a recommendation prior to sentence (R. 154).

innocent and that if the law was as Collard explained it, her case was hopeless (R. 55, 75, 78).

It is quite apparent that Collard's explanation of the nature of a conspiracy was erroneous and misleading. Mere passive cognizance of the crime or unlawful act to be committed or mere negative acquiescence is not sufficient to make one guilty of conspiracy. *11 Am. Jur.* 544. Cf. *Smith v. O'Grady*, 312 U. S. 329 where petitioner was advised by the trial judge that his only relief from illegal imprisonment was by application to the Parole and Pardon Board.)

The foregoing testimony shows beyond question that petitioner was misled and deceived by Collard as to her legal rights. Her testimony clearly demonstrates that the erroneous advice and explanations given by Collard greatly influenced her subsequent thoughts and actions and counted heavily in coercing her plea of guilty (R. 55, 75). Petitioner's disastrous interview with Collard should not be considered as an isolated incident but should be evaluated with preceding related events, namely, the sketchy and off hand example of assistance of counsel furnished petitioner at the arraignment and the nonappearance thereafter of counsel the court promised to appoint for her. So viewed, the events appear as a pattern of official indifference to petitioner's Constitutional right of counsel and a callous disregard of her extreme need for substantial and effective assistance of counsel.

As was appropriately pointed out in *Powell v. Alabama*, *supra:*

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evi-

dence. * * * He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Equally illuminating is the following language from *Johnson v. Zerbst, supra:*

> "The Sixth Amendment guarantees that: 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution if presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious."

In *Carter v. Illinois,* 329 U. S. 173, the following observation was made:

> "There are situations when justice cannot be administered unless persons charged with crime are defended by capable and responsible counsel."

It is submitted that the case at bar presents such a situation.

(d) Petitioner's plea of guilty was coerced by agents of the F. B. I.

(1) F. B. I. agent Collard gave petitioner erroneous and misleading advice as to the indictment, the nature of the charge and her legal rights.

(2) F. B. I. agent Collard permitted petitioner to believe there was truth in a report that unless she pleaded guilty her husband would be implicated.

(3) F. B. I. agent Kirby gave petitioner to understand that if she were the only defendant not pleading guilty, the question of whether she would be permitted to have a trial would be decided by the United States Attorney's office.

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(1) F. B. I. agent Collard gave petitioner erroneous and misleading advice as to the indictment, the nature of the charge and her legal rights.

The facts concerning the erroneous and misleading advice given petitioner by agent Collard are set forth under (c) above and are adopted under this classification without repetition. Whether petitioner's plea was coerced as a result of this advice, alone or in conjunction with the other facts set forth under (d) (2) and (3) above, will be discussed under this heading.

> "Although it is difficult to define coercion sharply, coercion exists where one is, by the unlawful conduct of another, induced to do or perform some act under circumstances which deprive him of the exercise of his free will." *11 C. J.* 946.

That petitioner was misinformed, misled, and deceived by F. B. I. agent Collard can scarcely be denied upon this record. As a direct and immediate result of his erroneous legal advice petitioner was led to believe that (a) conferring however innocently with people who afterwards turned out to be guilty of criminal acts made her guilty of conspiracy under the law of the United States (b) if she went to trial the burden would be upon her to prove her innocence and (c) that her case was hopeless with no alternative but to plead guilty and permit the probation department to explain the circumstances to the sentencing judge. To deny that these induced beliefs did not overpower petitioner's will and leave her no alternative but to plead guilty is to shut one's eyes to the undisputed evidence in the record. Under any definition of the term, it is submitted that petitioner was induced to plead guilty under circumstances which deprived her of her free will and that this constituted coercion. It was held by this Court in *Waley v. Johnston*, 316 U. S. 101, that "a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession." In *Walker v. Johnston*, 312 U. S. 275, this Court stated: "If he (petitioner) did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right."

See also *Smith v. O'Grady*, 312 U. S. 329.

(2) F. B. I. agent Collard permitted petitioner to believe there was truth in a report that unless she pleaded guilty her husband would be implicated.

Prior to her arrest, petitioner took care of her diabetic son constantly. After the arrest, her husband looked after the boy who was finally placed in a home some three months later. In the interim he was cared for by some neighbors, but because it was a complicated case, they did not wish to continue caring for him. A few days after petitioner's arrest, her husband lost his position as instructor at Wayne University and took a job that paid $35.00 a week—a sharp reduction in income. Petitioner was greatly concerned about the boy and when, shortly after her legal conference with F. B. I. agent Collard, she heard a report that unless she pleaded guilty her husband would be implicated in the case, she became greatly alarmed and asked to speak to Collard. When he arrived, she repeated to him what she had heard and asked him if there was any truth in the report. He told her he could not answer the question which petitioner construed as meaning there was some truth in what she had heard. Greatly troubled, confused and desperate and fearful that there would be no one to look after the diabetic boy, petitioner told F. B. I. agents Hanaway and Collard that she was ready to plead guilty. She was immediately taken before a Federal Judge where she entered her plea.

The foregoing facts are undisputed.

Any attorney undoubtedly would have been able to quiet petitioner's fears by pointing out that her husband's implication or nonimplication in the case could not depend upon whether she pleaded guilty but would depend entirely upon evidence pointing to his guilt. But "that which is simple, orderly, and necessary to the lawyer—to the un-

trained layman—may appear intricate, complex and mysterious.'"[6] Unadvised and under circumstances of extreme emotional stress, petitioner was unable to reach any other conclusion than that she must plead guilty. Obviously at this stage of the proceedings, petitioner stood in sore need of the kind of legal assistance contemplated by the Sixth Amendment.

(3) F. B. I. agent Kirby gave petitioner to understand that if she were the only defendant not pleading guilty, the question of whether she would be permitted to have a trial would be decided by the United States Attorney's office.

Kirby visited and talked with petitioner at the county jail on a number of occasions after her arraignment and before she pleaded guilty. On one of these visits petitioner testified he stated in her presence that he had been in Milan (location of a Federal prison near Detroit) and that the other defendants in the case would plead guilty the following week (R. 85).[7] Kirby did not deny this but testified that he did not recall making the statement (R. 134). However, he at least partially confirmed petitioner's testimony as follows (R. 134):

> "Q. And did she (petitioner) ask you that if all the other defendants pleaded guilty whether she would have a right to a trial?
>
> A. I believe she did ask me that question on one occasion.
>
> Q. And did you answer that question?
>
> A. To the best of my recollection, my answer was that the question of trial would be up to the United States Attorney's office."

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[6] *Johnson v. Zerbst, supra.*

[7] All other defendants did not plead guilty. *Thomas v. United States*, 151 F. 2d 183, C. C. A. 6.

Petitioner was entitled to know that her right to a trial was guaranteed by the Sixth Amendment. No one advised her of this, however, and Kirby's statement was obviously both misleading and untrue. In effect, petitioner was told that if she did not plead guilty, it was at least questionable whether she would be permitted to have a trial.

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law." If the record shows, and it is earnestly contended that it does show, that petitioner's plea of guilty was coerced by federal law enforcement officers, her conviction was contrary to and in violation of the due process mandate of the Fifth Amendment and therefore invalid. *Waley v. Johnston, supra; Walker v. Johnston, supra.* Cf. *Smith v. O'Grady, supra.*

(e) The purported waiver of counsel signed by petitioner is invalid because

(1) The waiver itself is illegible in essential parts including the identifying title, and by its terms is a waiver of the right to be represented at the trial of the cause;

(2) Petitioner did not understand and was not advised of the meaning and consequences of the waiver and signed it upon the assurance of the United States attorney in charge of the case that it was just a matter of form;

(3) The coercion to which petitioner was subjected vitiated the purported waiver of counsel.

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(1) The waiver itself is illegible in essential parts including the identifying title, and by its terms is a waiver of the right to be represented at the trial of the cause.

At the time petitioner pleaded guilty, she was handed a poorly mimeographed form to sign (R. 36, 67, 108-110). Parts of the form (R. 36) are very difficult to read, particularly the title which, *if it had been properly typewritten or mimeographed,* would have read: WAIVER OF ASSIGNMENT OF COUNSEL. The fact is, however, that this, perhaps the most important part of the instrument so far as the accused is concerned, is all but illegible. A defendant who signs away an important constitutional right should be entitled to a legible instrument with a readable title.

The body of the instrument reads in part:

> "I • • • do hereby • • • waive • • • my right to be represented by counsel *at the trial of this cause.*" (Italics supplied.)

The instrument in question does not support the contention that petitioner waived assistance of counsel in connection with her plea of guilty and it is clear from the record that petitioner did not understand the proceeding at which she pleaded guilty to be a trial (R. 109). The record does not show that petitioner waived her right to counsel in connection with her plea of guilty, at which time the assistance of counsel was vital to her. *Williams v. Kaiser, supra.*

(2) Petitioner misunderstood and was not advised of the meaning and consequences of the waiver and signed it upon the assurance of the United States attorney in charge of the case that it was just a matter of form.

The record indicates considerable confusion concerning the purported waiver of counsel. The confusion was by no means confined to petitioner. Assistant United States Attorney Babcock who appeared with petitioner when she pleaded guilty testified that he had no definite recollection of her signing the purported waiver (R. 162) and also that he did have an independent recollection that she signed it (R. 165). He admitted that he did not explain the meaning of the waiver to petitioner and stated that he had no distinct recollection of the District Judge explaining the waiver but testified: "If any of our Judges have missed doing that, I would have remembered that very distinctly" (R. 166).

F. B. I. agents Collard, Hanaway, Kirby and Dunham were present in the courtroom when petitioner pleaded guilty and testified concerning the proceedings. None of them said anything about the purported waiver having been explained to petitioner. Agent Kirby admitted on direct examination that he had no independent recollection of petitioner signing any paper at that time (R. 133).

No record of the proceedings before the District Judge who accepted the plea was introduced into evidence at the habeas corpus proceeding although Assistant United States Attorney Babcock testified that according to his remembrance there was a court reporter in the courtroom at the time (R. 161).

It is quite evident from the record that petitioner herself was considerably confused as to the purported waiver. On cross-examination petitioner testified (R. 108, 109):

> "Q. And then the Judge asked you whether you wanted an attorney?
>
> A. I do not remember that he asked me that question.
>
> Q. Did he ask you to sign something?
>
> A. No. A note was given to me, and I don't know who gave it to me.
>
> Q. Did you sign it?
>
> A. Yes, after I asked Mr. Babcock about it.
>
> Q. Did you read it?
>
> A. I read it.
>
> Q. What do you remember reading?
>
> A. I remember that it was said that I was to appear for trial in court if I was requested to do so, and I did not want that.
>
> Q. Did you sign it?
>
> A. I asked Mr. Babcock what that trial affair means, and Mr. Babcock said that it is more or less a—I understood that a matter of form, and he said that is all right, you can sign this. And I signed it."
>
> * * * * *

Petitioner was under the impression that what she signed was small piece of paper. The court questioned her as follows (R. 109, 110):

> "The Court: You said that you did not think the paper was as large as the one counsel offered you. It may be because that is a photostatic copy, and is

black, and it looks larger. Was that the type,—look at that paper.

A. Yes, but I cannot remember—

The Court: That is the form that is used?

A. Well. I think that—I tell the truth, your Honor. I cannot remember.

The Court: Do you remember reading something?

A. Something about appearing for trial.[8]

The Court: Oh, well, there is nothing on this about appearing for trial."

Petitioner's testimony on direct examination as to the purported waiver is consistent with that quoted above and indicates that she misconceived the purport and meaning of the instrument she signed (R. 66, 67).

(3) The coercion to which petition was subjected vitiated the purported waiver of counsel.

In *Waley v. Johnston, supra,* this Court held:

> "And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction."

Applied to petitioner's case, this holding would strike down as invalid an instrument executed to facilitate a coerced plea of guilty.

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[8] The concluding words in the body of the purported waiver are "at the trial of this cause" (R. 36).

Presumption Against Waiver of Fundamental Rights

There is a presumption against waiver of fundamental rights, *Johnson v. Zerbst, supra; Glasser v. United States, supra,* and a plea of guilty does not *ipso facto* constitute a waiver of the right to assistance of counsel, *Rice v. Olson, supra.*

In *Johnson v. Zerbst, supra,* this Court made the following observation:

> "It has been pointed out 'that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' "

And in *Glasser v. United States, supra,* this Court stated:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against waiver of fundamental rights."[9]

The question of whether there was a valid and competent waiver of counsel imposes a great responsibility upon the trial judge and, as has been pointed out by this Court, there should be a record of the trial judge's determination upon this point. *Johnson v. Zerbst, supra; Glasser v. United States, supra.*[10]

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[9] Cf. *Adams v. United States ex rel. McCann, supra,* where the defendant, familiar with trial and appellate procedure, refused proffered assistance of counsel, stating that no attorney could represent him as well as he could represent himself, and signed a written waiver of trial by jury.

[10] See also, for an adoption of this suggestion, Michigan Court Rule 35A effective September 1, 1947 following decision of this Court in *De Meerleer v. Michigan,* 329 U. S. 663.

Some point is made in the majority opinion of the Circuit Court of Appeals that petitioner stated on several occasions she did not wish to consult an attorney and wanted to settle the matter herself (R. 185, 186). This testimony should be considered in the light of petitioner's previous experience with assistance of counsel at the arraignment, the unfulfilled promise of counsel after arraignment and the legal advice given petitioner by F. B. I. agent Collard which convinced her that her case was hopeless. Thus conditioned, it is understandable why petitioner would be skeptical about the help she might expect to receive from counsel. F. B. I. agent Dunham summed up the situation neatly when he testified that petitioner did not feel that discussing the matter with a lawyer would be of much assistance to her because her consideration was not only for herself, but for her husband and family (R. 148). Petitioner, however, denied that she ever refused the assistance of counsel or that she stated she did not want counsel. But even assuming *arguendo* that petitioner did refuse the assistance of counsel, this by no means disposes of the question. *Adams v. United States ex rel. McCann, supra*. Under the rulings of this Court, the test is not whether an accused refused the aid of counsel, but rather whether he did so freely, competently and understandingly, which necessarily raises questions of law and fact. To contend that because petitioner refused to consult counsel she validly waived her rights in that respect is to grossly oversimply the problem involved and to disregard voluminous and convincing evidence and proofs to the contrary. F. B. I. agent Dunham's admission that petitioner was endeavoring to get advice or information from him and that she "tried in the best way she could to get some idea" (R. 151) is convincing evidence of petitioner's desperate attempt to get advice and her great need for counsel. Testimony of agents Dunham and Collard that they advised petitioner to speak

to her attorney is met by two undisputed facts: neither petitioner nor her husband had any funds to retain an attorney, and the attorney the court promised to send to her and whom she expected never came.

At the time petitioner signed the "waiver" and pleaded guilty she understood, as a result of her conference with F. B. I. agent Collard, that she would have the burden of proving her innocence of the charge if she went to trial, and she was convinced that her case was hopeless by the definition of conspiracy given her by Collard. Petitioner did not learn that in the United States there is a presumption of innocence and that the prosecution has the burden of establishing guilt until about two and a half months after she pleaded guilty (R. 73). Petitioner's information on this point was confirmed by F. B. I. agent Dunham (R. 78). When petitioner was asked in the trial court whether she would have pleaded guilty had she known these facts beforehand (R. 73) the Government attorney objected on the ground that "there mere fact that she found out later that it *might have been tough for the Government to prove the case* doesn't establish that she didn't enter her plea intelligently" (R. 74; emphasis added). It is submitted, however, that a plea of guilty made by one who does not understand the nature of the charge or the elements of the offense for which he has been indicted and is made under a misapprehension as to material facts (which could or might have been corrected by assisting counsel) is not a free and voluntary admission of guilt or a valid waiver of the right to have the assistance of counsel. See *Parker v. Johnson*, 29 F. Supp. 829, and *McDonald v. Johnston*, 62 F. Supp. 830.

A point is made in the majority opinion of the Circuit Court of Appeals (R. 186) that petitioner was advised by one judge that she was entitled to counsel, and that a sec-

ond judge asked her specifically whether she wished to be represented by counsel. Sufficient reference has heretofore been made to the inadequate representation petitioner was furnished at her arraignment, and to the failure of the court to appoint counsel to represent petitioner thereafter as promised, to indicate how thoroughly petitioner was confused and discouraged by these experiences. As to being interrogated by the second judge, it may be conceded that routine questions were put to petitioner, though the record falls far short of showing compliance with the requirements of this Court with respect to the duty of a trial judge in connection with determining the validity of waiver of counsel *(Johnson v. Zerbst, supra)*, and it must be remembered that the questions were asked after petitioner had been conditioned into a state of abject acquiescence by the unlawful acts she charges violated her Constitutional rights.

It is submitted that under the circumstances shown by this record, the presumption against waiver of fundamental rights is strikingly applicable.

(f) Petitioner was not apprised of the consequences of waiving counsel and pleading guilty to a charge carrying a maximum penalty of death.

In *Johnson v. Zerbst, supra*, this Court adverted to the duty of a trial judge in connection with waivers of right to counsel and said:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of the trial court, in which the accused—whose life or liberty are at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused * * * and it would be fitting and

appropriate for that determination to appear upon the record."

In connection with such an investigation it would appear imperative that the accused be advised of the maximum penalty to which he exposes himself by a waiver of counsel and a plea of guilty, particularly in a capital case.

There is no showing whatsoever that petitioner was advised by anyone that the maximum penalty for the crime with which she was charged was death. She was not apprised of the consequences of waiving her right to counsel or of pleading guilty. Without this information, it is submitted that petitioner could not intelligently and competently waive her right to counsel and plead guilty. See *Foster v. Illinois*, — U. S.—, 67 S. Ct. 1716; *Carter v. Illinois*, 329 U. S. 173; *De Meerleer v. Michigan*, 329 U. S. 663.

* * * * *

The following facts are undisputed on this record:

1. Petitioner was not advised that there was a difference between the proceedings initiated by her arrest on presidential warrant and the criminal proceedings under the indictment with respect to her right to counsel.

2. Though without funds petitioner was not provided with effective assistance of counsel at any stage of the proceedings against her.

3. Counsel the court promised to appoint for petitioner was not appointed though petitioner waited for him to appear.

4. Petitioner was given misleading and erroneous information by F. B. I. agent Collard concerning the indictment, the charge and her rights.

5. Petitioner was permitted to understand by F. B. I. agent Kirby that if she were the only defendant not pleading guilty, the question of whether she could have a trial would be decided by the United States Attorney's office, and was not otherwise advised as to her right to trial.

6. Petitioner was permitted by F. B. I. agent Collard to believe there was some truth in a report that unless she pleaded guilty her husband would be implicated in the case.

7. Petitioner was not apprised of the consequences of waiving counsel and pleading guilty to a charge carrying a maximum penalty of death.

8. Petitioner misunderstood and was not advised of the purport and meaning of the "waiver" she signed.

9. At the time she pleaded guilty petitioner was ignorant of the rules governing the burden of proof and the presumption of innocence in criminal trials.

10. The "waiver" petitioner signed is partially indecipherable and according to its terms waives counsel "at the trial of this cause."

* * * * *

The following quotation from *Smith v. O'Grady, supra,* is believed to be peculiarly applicable here:

> "The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty."

Likewise the following from *Williams v. Kaiser, supra:*

> "He needs the aid of counsel lest he be the victim of overzealous prosecutors, or the law's complexity, or of his own ignorance or bewilderment."

CONCLUSION

In consideration of the foregoing, petitioner respectfully prays that the judgment of the Circuit Court of Appeals for the Sixth Circuit herein may be reversed.

Respectfully submitted,

G. LESLIE FIELD,
Attorney for Petitioner,
415 Dime Building,
Detroit 26, Michigan.

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